ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	
Access to the Internet Over	)	GN Docket No. 00-185
Cable and Other Facilities	)	

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox") hereby submits these reply comments in the above-referenced proceeding.

As described in Cox's initial comments, the high-speed data services offered over Cox's cable networks meet the statutory definitions of both "cable service" and "information service."[1] In no event do they qualify as "telecommunications service" or "common carrier service," as defined by relevant case law and the Communications Act.[2]

One court, however, has issued a final ruling disagreeing with Cox's assessment that its cable data services can appropriately be classified as a Title VI cable service. In the *Portland* decision, the Court of Appeals for the Ninth Circuit concluded that local franchising authorities may not impose "open access" requirements on cable operators providing cable modem service because that service is not a "cable service" under

[1] Comments of Cox Communications, Inc. ("Cox Comments") at 26-30 (in addition to meeting the definition of TitleVI "cable services," cable Internet services also are properly classified as Title I "information services"). *See also* Comments of NCTA at 5-32; Comments of Comcast Corporation at 14-26; Comments of AT&T Corp. at 6-20; Comments of the National League of Cities, et al. at 5-12, 24-27.

[2] Cox Comments at 30-41 (cable Internet service providers do not provide a telecommunications service; "telecommunications services" and "information services" are mutually exclusive; Congress intended that information service providers not be subject to telecommunications regulation). *See also* Comments of AT&T Corp. at 20-24; Comments of NCTA at 8-17; Comments of Comcast Corporation at 24-25; Comments of the National League of Cities, et al. at 16-24.

Section 602(6) of the Communications Act.[3] In the wake of the court's ruling that two-way high-speed Internet access provided over a cable network is not a "cable service," Cox concluded -- in good faith and after great deliberation -- that it had no choice but to suspend its collection and payment of cable franchise fees on the revenues generated by its broadband data services in Ninth Circuit states, pending further clarification of the classification issue by the FCC.[4] However, Cox recognizes that this required change may have an adverse financial impact on some local franchising authorities, and it continues to engage in discussions with those local franchising authorities who have expressed concerns in hopes of reaching a mutually satisfactory resolution.[5]

Both USTA and NATOA suggest in their comments that Cox's response to the *Portland* decision is somehow inappropriate. Their concerns, however, apparently are based on a misunderstanding of the relevant facts. For example, NATOA states that "Cox has not paid money into the universal service fund; it has not obtained necessary state or local certificates required under Section 253; and it has not interconnected nor made its facilities available to others under Section 251. Nonetheless, the company now

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[3] *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). Because the parties in the *Portland* litigation did not appeal the Ninth Circuit's ruling, that decision is now final. The Eleventh Circuit also has concluded that high-speed data services offered by cable operators are not Title VI cable services, deciding instead that they are "information services." *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000). The Eleventh Circuit's decision, however, is currently on appeal to the United States Supreme Court, and thus is not yet final.

[4] Indeed, when Cox voluntarily began paying cable franchise fees on its cable modem services in 1997, it notified its local franchising authorities in writing that the regulatory classification of those services was subject to change, and that the payment of cable franchise fees on high-speed data service was also subject to change in the wake of a binding court decision or legislative or regulatory developments. Cox has numerous cable systems in California, Nevada, Arizona and Idaho that are governed by the Ninth Circuit's ruling. Those systems would be subjected to significant litigation risk if they were to continue collecting a cable franchise fee on high-speed data services. *See* "AT&T Seeks Waiver of Franchise Fees on Cable Modem Service," *Communications Daily*, Wednesday, January 3, 2001 at 3.

[5] In response to the *Portland* decision, some local governments in the Ninth Circuit have adopted a "wait and see" approach. For example, Kern County, California has chosen to "waive fees that are due on gross receipts" from cable modem service for two years while the regulatory landscape clears. *See* Letter from Kern County Administrative Office to Julie McGovern, General Manager, Cox Communications Bakersfield, dated August 10, 2000.

refuses to pay franchise fees mandated under Title VI."[6] Similarly, USTA asserts that, despite concluding that its cable data services "are telecommunications services beyond the reach of local cable regulators," Cox has failed to "demonstrate[] any intent to make payments to the universal service fund as required under Section 254(d) of the Act."[7]

None of these statements is true. Cox continues to pay cable franchise fees on all services that have been deemed to be Title VI cable services, including traditional video programming services and its new digital cable offerings. These fees generated more than $52 million dollars of revenue in the last year alone for local governments in Ninth Circuit states served by Cox. And, Cox would have continued to pay cable franchise fees on its cable data services within the Ninth Circuit but for the recent *Portland* ruling.[8] Indeed, it continues to pay such fees on its high-speed data services in every state except those located in the Ninth Circuit.[9] Cox thus can hardly be accused of "refusing to pay franchise fees mandated under Title VI."

Similarly, Cox's telephone subsidiaries in the Ninth Circuit states have received all state and local authorizations needed to provide local telecommunications services, and Cox provides such services on a broad scale to residential and business customers. In fact, by the end of last year, Cox had roughly 100,000 residential telephony customers in California alone. When providing these telecommunications services, Cox complies with

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[6] Initial Comments of National Association of Telecommunications Officers and Advisors et al. at 6.
[7] Comments of USTA at 23-24.
[8] Notably, the National League of Cities and its co-commenters recognize that local franchising authorities cannot collect cable franchise fees on cable data services if those services are not classified as Title VI cable services. *See* Comments of National League of Cities et al. at 13 ("if the logic of the *Portland* decision were applied nationwide and cable modem services were deemed not to be a 'cable service,' the cost to the nation's local governments in lost cable franchise fees would be staggering").
[9] As noted above, although the Eleventh Circuit has found that cable data services are "information services" rather than "cable services," the case in which it made that determination currently is on appeal to the U.S. Supreme Court, and thus is not yet final. *See* n. 3, *supra*. Accordingly, Cox systems located in Eleventh Circuit states continue to treat their high-speed data services as Title VI cable services, and continue to pay cable franchise fees on the revenues they generate.

all of the obligations imposed on common carriers by state and federal law, including all interconnection requirements. And, as it is required to do by law, Cox pays a significant portion of the revenues generated by these telecommunications services into state and federal universal service funds. Indeed, because it has been designated a Carrier of Last Resort in California, Cox actually receives payments from that state's universal service fund to provide telecommunications services to certain customers.

Cox appreciates that NATOA is unhappy with the Ninth Circuit's conclusion that cable data services are not Title VI cable services. Cox itself strongly disagrees with the court's discussion that such services include a "telecommunications service" component. Far from "reasoning" that its cable data services are "telecommunications services," as USTA claims, Cox has vigorously -- and repeatedly -- disputed such a conclusion.[10] Of course, because the Ninth Circuit's analysis in this regard was not needed to decide the *Portland* case, it is non-binding dicta. The Commission thus is free to embrace Cox's position, fully explained in its opening comments, that Cox's cable data services are pure information services that have no segregable telecommunications service component.[11]

Moreover, the *Portland* opinion makes clear that it is up to this Commission to decide whether to regulate cable data services and, if so, which rules and policies to apply. The Ninth Circuit specifically noted that, "[t]hus far, the FCC has not subjected cable broadband to any regulation, including common carrier telecommunications regulation."[12] It further stated that, because "Congress has reposed the details of telecommunications policy in the FCC," "we will not impinge on its authority over these

[10] Cox Comments at 30-41; *see also* Ex Parte Letter from Alexander V. Netchvolodoff, Vice President - Public Policy, Cox Enterprises, Inc., to Chairman William E. Kennard, filed December 4, 2000 in GN Docket No. 00-185 ("regardless of whether Cox@Home is also a cable service, it most certainly is an information service and it most certainly is not a telecommunications service")(emphasis in original).

matters."[13] Accordingly, it is not until the FCC determines that cable (and all other facilities-based) Internet access services should be subjected to the full panoply of Title II common carrier requirements that Cox could begin to comply with them.[14] Because the Commission may well conclude that cable modem services are not telecommunications services (or, even if they are, that they should not be subjected to telecommunications service regulation), it is premature at best to insist that Cox's provision of high-speed Internet access comply with Title II.

Respectfully submitted,

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[11] *See also* Comments cited in n. 1, *supra.*
[12] *Portland*, 216 F.3d at 879.
[13] *Id.* at 879-80.
[14] Cox is thus perplexed by NATOA's suggestion in a recent ex parte presentation that the FCC should "warn" Cox and other cable companies that they cannot "simply relieve themselves selectively of regulatory obligations." *See* Letter from Libby Beaty, Executive Director, NATOA, to Chairman William E. Kennard, dated December 4, 2000 at 1.

CERTIFICATE OF SERVICE

I, Roberta L. Rosser, a Legal Secretary in the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 10th day of January, 2001, I caused copies of the Reply Comments of Cox Communications, Inc. to be sent via hand-delivery to the following:

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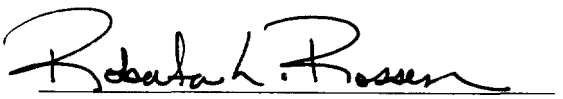

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